U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: MAY 23, 1989
CASE NO. 88-INA-413

IN THE MATTER OF

TEXAS INSTRUMENTS, INC.
Employer

on behalf of

JOSE LUIS ESCOBAR-DIMAS
Alien

Appearance: S. M. Mims, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, Guill, Tureck, and Williams
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Employer, Texas Instruments, Inc., a manufacturer of integrated circuits located in Dallas, Texas, submitted the application for labor certification on behalf of the Alien, Jose Luis Escobar-Dimas, for the position of Product Engineer, on August 25, 1987 (AF 57-59). The requirements for the job, as stated by the Employer in the ETA 750A, included a B.S. in Electrical Engineering, two years experience in semiconductor device assembly processing and testing, knowledge of assembly language and Pascal for programming automatic testers, knowledge of semiconductor devices, packages and assembly processes, and familiarity with advanced analog testing techniques.

The Employer recruited for the position in September 1987. Four U.S. workers applied for the position and all were rejected (AF 43). One U.S. applicant, Gary Hammond, a former employee of the Employer, was rejected, according to a letter to the Texas Employment Commission dated October 14, 1987, because he "has been out of the field for seven years and does not possess the experience to step into this position."

The C.O. proposed to deny the application for labor certification in his Notice of Findings (NOF) dated February 2, 1988, on the ground that the Employer violated section 656.21(b)(7) by unlawfully rejecting Hammond (AF 31). The C.O. asserted that Hammond had the required degree, knowledge of Pascal and assembly languages and is a former employee of the Employer with semiconductor experience. The Employer filed a rebuttal to the NOF dated February 9, 1988 (AF 29) and the C.O. denied the application for labor certification in his Final Determination dated May 18, 1988 (AF 26-27). On June 21, 1988 the Employer submitted a "Request for Reconsideration or Alternatively, Request for Administrative Review" (AF 5-24). The C.O., after considering the evidence and arguments submitted in the Request for Reconsideration, rejected the Employer's request and forwarded the file for administrative review (AF 3-4).[1] The Employer filed a brief before this Board on September 15, 1988. The C.O. did not file a brief.

[1] New evidence submitted by the Employer in its "Request for Reconsideration or Alternatively, Request for Administrative Review" can be considered by the Board since the C.O. considered such evidence in his affirmance of the denial of certification. Construction and Investment Corp., 88-INA-55 (April 24, 1989).

Discussion

The Employer makes essentially two arguments in support of its position that Hammond was rejected for lawful, job-related reasons. First, the Employer asserts that Hammond was lawfully rejected for lacking recent and pertinent knowledge of semiconductor technology. In its rebuttal to the NOF, the Employer stated that Hammond was rejected because he received his technical training at least seven years ago, a personal interview of the applicant indicated that he had failed to keep up with "the ever changing technology within the semiconductor industry" and that the applicant would need nine months to one year of training (AF 29). In response to the rebuttal the C.O.'s Final Determination stated solely that the Employer's unattested statements are insufficient to prove the applicant unqualified and that the Employer has not rebutted the findings made in the NOF (AF 26-27). The C.O. stated that the proper documentation should consist of official records, signed statements of disinterested persons and notarized affidavits.

The Employer, in its Request for Reconsideration submitted affidavits from its Operations Manager, Michael Bartlett, as well as from the manager of its Linear Intergrated Test Section, Richard Klein, stating that significant advances in the semiconductor field have occurred since Hammond left the Employer in 1980 (AF 14, 19). According to Bartlett, "[a]nyone such as Mr. Hammond whose semiconductor product experience is from almost eight years ago is greatly out of date and basically useless without a long period of training" (AF 14). Moreover, Kingsley Wong, a manager within the Employer's Semiconductor Group, attested that while interviewing Hammond for the position offered, Hammond was unable to answer standardized questions designed to ascertain the applicant's basic engineering knowledge (AF 21).

Significantly, the C.O., in his rejection of the Employer's Request for Reconsideration, failed to squarely address the arguments and evidence submitted by the Employer (AF 4). The C.O. states solely that Hammond meets the minimum requirements for the job and that Hammond is presently as qualified for the position as the Alien was when the Alien was hired for the position (emphasis in original).[2]

We find the Employer's argument persuasive. At the outset, we find that given the Employer's uncontested, detailed affidavits stating that semiconductor technology is rapidly changing, its requirement of "knowledge of semiconductor devices" encompasses the requirement of pertinent, reasonably current knowledge. While Hammond did indeed work for

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[2] The C.O.'s additional ground for denial in his rejection of the Request for Reconsideration, that Hammond is presently as qualified for the position as the Alien was when hired by the Employer, has no merit. The Employer has demonstrated that pertinent, reasonably current semiconductor knowledge is a valid requirement for the position at the present time. The record indicates that the Alien worked as an Engineering Technician throughout the eight years before his employment as a Product Engineer with the Employer (AF 59). Thus, the Alien had pertinent semiconductor knowledge immediately prior to his employment in the position offered. Hammond, according to his resume, has worked as President of a corporation, Vice-President of Operations, Director of Operations, and Data Processing and Mail Room Manager in the last seven years (AF 51-52). None of these positions involved knowledge of semiconductors.

the Employer in the semiconductor field in the past, it is uncontested that Hammond ceased working for the Employer nearly eight years ago and has subsequently worked in areas completely unrelated to semiconductors, and that Hammond's eight-year-old semiconductor knowledge is so obsolete that the applicant would require a lengthy period of retraining not required of applicants with reasonably recent semiconductor knowledge. Thus, the Employer has proven that Hammond lacked knowledge of semiconductor devices, a valid job requirement, and was therefore lawfully rejected on that ground.

Likewise, we also agree with the Employer's argument that it lawfully rejected Hammond as Hammond lacked the required two years of experience with semiconductor device assembly processing and testing (AF 7-8). Specifically, the Employer submitted a signed affidavit of Richard Klein, Hammond's supervisor when Hammond worked as an Engineering Technician from 1975-1980 for the Employer and for a few months in 1980 when the applicant worked as a Product Engineer (AF 19-20). Klein stated that Hammond's experience both as a technician and as a Product Engineer involved testing activities but did not involve processing or alterations or modifications of processes. Given the C.O.'s failure to respond to the Employer's assertion, and the persuasive evidence submitted by the Employer, we hold that Hammond failed to meet the Employer's valid requirement of two years experience with semiconductor device assembly processing.

ORDER

The Final Determination of the Certifying Officer denying labor certification is REVERSED, and the application for labor certification is hereby GRANTED.

LAWRENCE BRENNER
Administrative Law Judge

LB/DC/gaf